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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT WASHINGTON,

Defendant and Appellant.

B281901

(Los Angeles County
Super. Ct. No. TA137779)

APPEAL from the judgment of the Superior Court of Los Angeles County. Teresa P. Magno, Judge. Affirmed.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Kenneth C. Byrne and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Vincent Washington appeals from his conviction by jury of one count of attempted murder and six counts of robbery. The jury also found true multiple firearm use allegations pursuant to Penal Code section 12022.53. Defendant challenges his conviction on three grounds. First, he contends the court excluded exculpatory evidence crucial to his defense in violation of his rights under the Sixth and Fourteenth Amendments. He also contends the trial court committed evidentiary error in precluding expert testimony on purported irregularities in the photographic and field lineups. Finally, defendant argues that even if his conviction is affirmed, a remand for resentencing is warranted in light of the passage of Senate Bill No. 620 during the pendency of this appeal.

Finding no evidentiary error and that remand is not warranted, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In a second amended information, defendant was charged with nine felonies: one count of attempted premeditated murder (Pen. Code, § 187, subd. (a), § 664 [count 7]), two counts of attempted second degree robbery (§ 211, § 664 [counts 5 & 6], and six counts of second degree robbery (§ 211 [counts 1-4, 8 & 9]). As to counts 7 and 8, it was alleged that defendant personally used and discharged a firearm causing great bodily injury to the victim in the commission of the offenses (§ 12022.53, subds. (b)-(d)). As to counts 1, 2, 3, 6 and 9, it was alleged defendant personally used a firearm in the commission of the offenses (§ 12022.53, subd. (b)). Further, it was alleged defendant had suffered nine prior convictions within the meaning of section 667.5, subdivision (b). Defendant pled not guilty and denied the special allegations.

The first trial ended in a mistrial after the jury was unable to reach a verdict on any count. The following material facts were established by the testimony and evidence at the second jury trial which took place in February 2017.¹

In June 2015, Officer Chris Reza, a 17-year veteran of the Los Angeles Police Department, was assigned to investigate a series of robberies that had occurred within a couple of blocks of the Nickerson Gardens housing project in south Los Angeles. After going through the reports and speaking with the victims, Officer Reza noted a basic pattern to the robberies. The victims were approached at night by a suspect in a hoodie riding a BMX bike and carrying a handgun.

The first reported victims were Isabel H.² and her boyfriend, Cesar M. On June 27, 2015, at around 1:00 a.m., they were in their car on 113th Street, along with their four-month-old daughter. Cesar was driving and they had just pulled up to park in front of Isabel's home. There was a street light nearby. Isabel saw an African-American male wearing a dark-colored hoodie approaching on a bicycle. He was thin and had a "patchy" beard and short "nappy" hair. The bike was dark-colored and was not a beach cruiser. The man "quickly" jumped off the bike, dropped it to the ground and walked up to the passenger side door. He pointed a gun in Isabel's face and demanded everything she had.

¹ Because the jury did not reach a verdict on counts 4 and 5 and those counts were dismissed, we have not summarized the evidence with respect to those two counts.

² To protect their privacy, we refer to the victims only by their first name and the first initial of their last names.

Isabel gave him her purse, which contained her cell phone, her wallet, “everything.”

The man then walked around to the driver’s side door. Isabel was scared, particularly for her daughter, and told Cesar to give the man everything. Cesar handed over his wallet. The man then got back on his bike and fled.

Isabel grabbed her daughter and she and Cesar ran inside to call the police. Isabel told the police when they arrived that the robber was African-American, with small eyes, approximately 6 feet 1 inch tall and in his 20’s or 30’s.

Several days later, Isabel saw a man riding a bicycle in her neighborhood who looked like the robber, but he was on a different bike (a blue and white beach cruiser). He was wearing a small backpack that had white lettering on it (“LA”) like the Dodgers logo. Isabel recognized the man because he had the same type of hair and beard. She saw him again on the same bike on another day. Isabel called Officer Reza and told him about seeing the person who robbed her.

The next victim was David H. On July 14, 2015, around 11:00 p.m., David returned home from dinner and parked his truck on 113th Street. There was a streetlight nearby. David was approached by an African-American male on a mountain bike. David tried to get back into his truck, but the man tried to stop him and they struggled over the door. The man then pointed a gun right at David’s face and demanded “give [me] everything.” The man had a goatee and was wearing a loose-fitting hoodie, revealing braided hair. David complied and handed over his cell phone and wallet. He was afraid the man might shoot him, so he ran behind the rear of his truck for protection. He turned around to see if the man was following him. The man fled on the bike.

David phoned the police once he got inside his home. When the officers arrived, he told them the robber had been an African-American male with black hair and brown eyes, about five feet eight inches tall, 190 pounds, and approximately 25 to 30 years of age.

A few days later, David was driving to work and he saw the same man riding a different bicycle (a blue and white beach cruiser) in an alley near the housing projects. He was wearing jeans and a black hooded sweatshirt. Later that day, he called Officer Reza and reported he saw the robber riding a bike in his neighborhood.

On July 16, 2015, Joseph G. was dropping off his girlfriend at her house on 112th Street. It was close to 2:00 a.m. and quite dark outside. After his girlfriend had gone inside, Joseph walked back to his car and got in. His driver side window was open and he paused a moment to look at his phone before starting the car. Joseph noticed that someone passed by the passenger side of his car. Shortly thereafter, he noticed in his side view mirror that a dark figure was approaching on the driver's side of his car. Almost immediately, he felt a gun being pressed into his left temple. The man said "give me all your money, give me your cell phone, give me everything."

Joseph tried to tell the man that his wallet was in the center console of the car and he would get it. While doing so, he glanced up at the man's face and noticed he had a thin face, prominent cheekbones and some sort of facial hair. Joseph handed the wallet to the man and told him to take everything in it but asked to keep the wallet because it had belonged to a friend who passed away. As soon as Joseph handed over the wallet, the man shot him in the shoulder and fled. Joseph ran into his

girlfriend's house. One of her family members called 911 and Joseph was taken to the hospital by ambulance.

Two days later on July 18, 2015, around 6:00 p.m., Joe T. and his wife arrived at a family member's home on 112th Street for a barbeque. It was not yet completely dark outside. Joe dropped his wife off at the house and then went to park the car. As he was parking, he noticed a thin, African-American male wearing a hoodie ride past on a "regular BMX bike." The man had prominent cheek bones and facial hair. When Joe got out of the car, he paused to grab some bags of groceries to take into the house. The man, now on foot, came up on his right side and put a gun at his neck and said "don't move." It was a handgun but not a revolver. The man told Joe to put his hands on the roof of the car and then he rummaged through his pockets. The man took his wallet, his car keys and his cell phone.

After the man fled on the bike, Joe T. went into the house and told everyone he was robbed. His wife's cousin called the police. When the police arrived, Joe described the robber as being approximately 20 years old, 5 feet 10 inches tall, and around 160 pounds. (The transcript of the 911 call showed the caller reported an age of 20's or 30's.)

On July 21, 2015, around 9:00 p.m., Paola L. had just come home from the gym and parked her car on 112th Street. Paola got out of her car and started to cross the street to her home. Someone approached from behind her on a mountain bike and "snatched" at her purse, which she was carrying over her shoulder, causing her to sort of spin and face toward him. Paola was holding her phone in her hand and the man, who was wearing a hoodie, yelled at her to give it to him. The man then raised his arm and made a motion like he was pointing a gun at

her, but she was not sure if he had a gun. Defendant then ran away with her purse that contained some money, a few gift cards, her driver's license and her car keys. She subsequently reported the incident to police.

Officer Reza explained that early in the investigation, two patrol officers detained a possible suspect (Artus Moore). Officer Reza contacted Isabel and Cesar and asked them to view the individual to see if they recognized him. Isabel drove with Cesar to a location a couple of blocks from her home where the man was being detained. Officer Reza explained that ordinarily he would not allow two victims to view a possible suspect together. However, Isabel was too frightened and would not participate if Cesar was not allowed to be with her, so he let them stay together for the identification. Officer Reza told Isabel to relax, and he read her the standard admonishment for a field identification: "The person is in temporary custody as a possible suspect only. The fact that the person is in police custody does not indicate his or her guilt or innocence. The purpose of the show-up is to either eliminate or identify the person as a suspect involved in the crime." Isabel told Officer Reza the man they had in custody was not the person who robbed them.

During the course of the investigation, an individual named Jimmy Harrison was detained trying to use one of Joe T.'s stolen credit cards. Officer Reza prepared a photographic lineup consisting of six photographs, one of which was a photograph of Mr. Harrison. (Defendant was not depicted in any of the photographs.) The photographic lineup was identified at trial as People's exhibit 10.

Officer Reza explained that the photographic lineups, referred to as "six-packs" because they consist of six photographs,

are prepared with the assistance of a computer program. The computer program randomly selects the photographs to be included with the photograph of a known suspect or person of interest. They do not use black and white photographs because they less accurately depict an individual's complexion. Officer Reza testified that the following admonishment is given before every victim or witness is shown a six-pack: "In a moment I'm going to show you a group of photographs. The group of photographs [may or] may not contain a picture of the person who committed the crime now being investigated. [¶] Keep in mind that hairstyles, beards and mustaches may easily be changed. Also, photographs may not always depict the true complexion of a person. It may be lighter or darker than shown in the photo. [¶] Pay no attention to any markings or numbers that may appear on the photos or any other differences in the type or style of the photographs. [¶] When you have looked at all the photos, tell me whether or not you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone."

Officer Reza asked Joe T. to come to the station to view the six-pack containing Mr. Harrison's photograph. After listening to the admonishment, Joe reviewed the six-pack and told Officer Reza the person who robbed him was not depicted. Joe was separately shown an individual photograph of Mr. Harrison and Joe said he was not the robber. David also came to the station to view the six-pack containing Mr. Harrison's photograph. David said that none of the pictures looked like the person who robbed him.

In response to the separate reports by Isabel and David that they had seen the man who had robbed them riding a blue

and white beach cruiser around the neighborhood, Officer Reza patrolled the neighborhood in an unmarked car with two partners. On July 22, 2015, at approximately 5:00 p.m., Officer Reza saw defendant riding a blue and white beach cruiser on 115th Street, near the general area of where the robberies had occurred. Defendant matched the general description given by both Isabel and David. Defendant was also wearing a backpack with "LA" stamped on it, consistent with Isabel's report. Officer Reza detained defendant. At the time of his arrest, defendant was noted as being five feet nine inches tall, 145 pounds, and 46 years of age.

Officer Reza called Isabel, Cesar and David and asked them to come to the police station for a field identification. After admonishing each of them, they separately identified defendant as the man who robbed them. Paola also arrived at the station for the field identification. She said the identification was a little difficult because defendant was moving his head around quite a bit and closing his eyes, but she positively identified him as the person who robbed her.

Officer Reza prepared a six-pack containing defendant's photograph in the number 3 spot. Joe T. returned to the police station and after being admonished, he identified defendant as the person who robbed him.

Detective Norman Peters was assisting in the investigation of the robberies and went to the hospital to interview Joseph, still recovering from the gunshot wound. Detective Peters presented Joseph with a six-pack containing defendant's picture in the number 4 spot. He admonished Joseph and told him it was alright if he did not recognize anyone. Joseph positively identified defendant as the person who robbed and shot him.

Detective Peters conceded that the photograph of defendant used in the six-pack was a few years old and not a current booking photograph.

With the exception of Joe T.'s credit card being used by Mr. Harrison, Officer Reza conceded that none of the stolen property was recovered or otherwise found in defendant's possession. Officer Reza also confirmed that no firearm was recovered, nor was defendant found in possession of a BMX style bike. Officer Reza explained they discovered some 17 or 18 addresses associated with defendant's name and determined it would not have been reasonable to attempt to obtain search warrants and search any of those locations as part of the investigation.

During her trial testimony, Isabel said defendant still had the thin face she recalled, but he was wearing glasses which he did not have on at the time of the robbery. She was nevertheless certain defendant was the person who robbed her. David also identified defendant in court as the person who robbed him. He noted defendant looked the same to him, except that he was a little heavier, somewhat older and was wearing glasses. David testified he had no doubts defendant was the man who robbed him.

The other victims also identified defendant in court. Joseph conceded he only saw defendant for a brief moment but that he was "without a doubt" the person who shot him. Joe T. said he was sure of his identification and would never say so if he were not because it would "not [be] fair for somebody innocent to go to jail." Paola testified she was sure defendant was the man who robbed her. She said he looked the same, except his facial hair was a little longer and he was wearing glasses.

Defendant presented the expert testimony of Dr. Iris Blandon-Gitlin, a cognitive psychology professor and court-approved panel expert on eyewitness identification issues. Dr. Gitlin explained that the brain cannot record memories like a video recorder, even for consequential events. Numerous factors will affect the initial perception and any later attempt to recall a memory. Relevant factors impacting perception that may result in gaps or affect the reliability of a memory are stress, lighting, distance, exposure time and race. When asked to recall and relay a memory, the brain naturally attempts to fill in the gaps. Individuals are often unconsciously influenced by both external and internal factors in reconstructing a memory. Seeing an individual who is similar in appearance to an individual one is trying to remember can result in “unconscious transfer.” The person will believe the similar-looking person is the individual they are trying to recall. Dr. Gitlin emphasized however that she was not offering an opinion that she believed any victim was intentionally lying, only that there are known factors that impact the way memories are recorded in the brain and recalled. People can be confident in a memory and still be inaccurate.

With respect to police identification procedures, Dr. Gitlin opined that photographic lineups are generally more accurate than field identifications. Photographic lineups reduce the chance for error when they are carefully constructed. Individuals used as the “filler” photographs should be similar in appearance and dress and the photographs should have a similar background so that the eye is not drawn to any one photograph by a distinctive characteristic. It is important for the administrator of the identification procedures to give clear instructions and admonishments. Dr. Gitlin also stated the better practice is to

use a “double-blind” procedure, meaning that both the person administering the procedure and the witness are unaware of which photograph contains the person of interest. Using a double-blind procedure helps ensure against the administrator of the test giving unconscious nonverbal clues to the witness.

Defendant testified in his own defense. At the time of trial, he was 48 years old. He denied being involved in any of the charged robberies or the attempted murder. He said he was most likely at home on the nights the robberies were committed because he often had his three-month-old daughter with him and he would have been at home to take care of her. Defendant denied owning any guns. He denied owning a BMX bike or any bike at all and said the light blue and white beach cruiser he was riding when he was arrested belonged to his niece. He used the bike occasionally for work. Defendant worked as a handyman in the neighborhood, cutting lawns, painting and the like. On the day he was arrested, he had used the bike to go to the gas station to buy gasoline for a lawnmower.

Defendant testified the picture of him used in the six-pack was several years old and he was the only one wearing a red shirt. He denied he was trying to avoid being identified during the field identification, and that he was moving his head around only because of the light being shined on him. It was bright and he had just been taken out of a holding cell where he had been asleep and his eyes needed to adjust. Defendant admitted that he had previously suffered two convictions for burglary of a motor vehicle and for receiving stolen property.

Defendant also called several of the officers who responded to the 911 calls of the victims and elicited testimony pointing out

some inconsistencies in the descriptions given of the robbery suspect.

The jury found defendant guilty of the attempted murder and robbery of Joseph G. (counts 7 & 8), and also found true as to both of those counts that defendant personally discharged a firearm in the commission of those offenses, causing great bodily injury to Joseph within the meaning of Penal Code section 12022.53, subdivisions (c) and (d). The jury found defendant guilty of five additional counts of second degree robbery (counts 1-4 & 9). As to the robbery counts, except count 4, the jury found true the allegation that defendant personally used a firearm in the commission of the robberies. (§ 12022.53, subd. (b).)

The jury was unable to reach a verdict as to counts 5 and 6. The court declared a mistrial as to those two counts and, on the prosecutor's motion, subsequently dismissed them pursuant to Penal Code section 1385.

In a bifurcated proceeding, the court found true that defendant had suffered six prison priors within the meaning of Penal Code section 667.5, subdivision (b).

The court imposed a state prison sentence as follows: an indeterminate term of life with the possibility of parole (minimum of seven years prior to eligibility) on count 7 (attempted first degree murder), plus a consecutive term for the firearm enhancement of 25 years to life; an upper term of five years on count 1, plus a consecutive term for the firearm enhancement of 10 years; as to each of counts 2, 3, 4, 8 and 9, a consecutive term of one year (one-third the midterm), plus a consecutive term for the firearm enhancement of three years four months; and consecutive one-year terms for each of the

six prison priors. The court awarded defendant 720 days of custody credits and imposed various fines and fees not at issue in this appeal.

This appeal followed.

DISCUSSION

1. There Was No Evidentiary Error

a. Other crime evidence

Defendant contends the court wrongly precluded him from presenting evidence that nine days after his arrest, while he was in custody, another robbery, fitting the pattern Officer Reza described, was committed in the same area around the Nickerson Gardens housing project. Defendant argues he was entitled to discuss that evidence to show that Officer Reza and the other officers investigating this series of robberies rushed to judgment and failed to thoroughly investigate all leads. Defendant contends the evidence was crucial to his defense and to rebut the prosecutor's theory of the case that the robberies fit a specific pattern and that the court's error therefore violated his constitutional rights to due process and to present a defense. We are not persuaded.

A trial court's ruling on evidentiary issues is ordinarily reviewed under the deferential abuse of discretion standard. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 372-373 [trial court's ruling under Evid. Code, § 352 excluding proffered third party culpability evidence reviewed for abuse].) Our Supreme Court has rejected efforts to inflate "garden-variety evidentiary questions into constitutional ones." (*People v. Boyette* (2002) 29 Cal.4th 381, 427.) A due process violation occurs only where evidentiary error results in the complete preclusion of a defense. (*Id.* at pp. 427-428; accord, *People v. Bacon* (2010) 50 Cal.4th

1082, 1104, fn. 4 & *People v. Thornton* (2007) 41 Cal.4th 391, 452-453.)

Here, it cannot be said, based on any fair reading of the record, that defendant was denied the ability to present a defense. Defendant extensively cross-examined the victims as to their respective identifications of defendant as the person who robbed them, successfully pointing out some inconsistencies in their observations. Defendant also cross-examined Officer Reza who admitted no physical evidence was recovered linking defendant to the crimes. Defendant put on the expert testimony of Dr. Gitlin who stated her opinions about the various factors that impact an individual's perceptions and memories. Defendant also took the stand in his own defense and denied his involvement in the string of robberies.

The court's ruling only precluded defendant from attempting to elicit testimony from Officer Reza about a robbery that took place nine days after defendant's arrest. At the beginning of defense counsel's cross-examination, Officer Reza was asked about his testimony on direct that there was a "similar pattern" to the robberies. Officer Reza confirmed there had been a pattern, including that the suspect generally approached the victims at night within a few blocks of Nickerson Gardens, riding a bicycle, wearing baggy clothing and a hoodie, and carrying a handgun.

Defense counsel then asked if the pattern was unique to the six counts alleged against defendant. The court overruled a relevance objection by the prosecutor and Officer Reza said "there might have been other reports" of similar robberies. When asked if there had been a similar incident in the same area about a

week after defendant was arrested, Officer Reza said he could not recall that.

When defense counsel began to ask an additional follow-up question, the prosecutor objected on the grounds of relevance and the court excused the jury for an early lunch so they could discuss the issue outside the presence of the jury.

The court asked defense counsel for an offer of proof. Counsel explained that nine days after defendant was arrested and was in custody, another robbery occurred in the same area by a young African-American male riding a BMX bike who pulled a gun on a Hispanic family at night and demanded their property. Defense counsel argued it was important for him to present this evidence to rebut the prosecution's efforts to show a modus operandi or similar pattern of robberies.

The court initially observed there was a foundational issue since Officer Reza had said he could not recall such a report, as well as hearsay issues. Defense counsel responded it was part of Officer Reza's job to be reviewing reports of similar robberies and he could testify accordingly. The court disagreed and said such testimony was hearsay and lacked foundation. The prosecutor then argued it was also third party culpability evidence, irrespective of defense counsel's intent in eliciting it, and it did not meet the standard for third party culpability evidence. The prosecutor also urged the court to find that it was irrelevant and properly excluded under Evidence Code section 352. The trial court agreed, but told defense counsel, he could revisit the issue of relevance.

The following day, the court stated it had thought some more about the third-party culpability evidence. The court ruled that the proffered evidence would be precluded because it did not

meet the legal standard for admissibility of third party culpability evidence set forth in *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*). However, the court also ruled the prosecution would be precluded from arguing there was a modus operandi or that the robberies were so unique and similar that only defendant could have committed them.

Defense counsel agreed he could not satisfy the *Hall* standard and stated he was not proffering a third party culpability defense, that is, someone else in particular had committed the robberies. Instead he argued the post-arrest robbery raised a reasonable doubt about his client's guilt and precluding the evidence violated defendant's constitutional right to present a defense. He stated the victim in the other robbery was under subpoena and there would be no undue consumption of time to present such evidence.

The court reasoned that the only purpose for proffering the evidence was to show that defendant "could not have done the [robberies] because someone else did." The evidence was therefore relevant only as third party culpability evidence, but defendant had not shown a connection between this other suspect and the robberies for which defendant was charged. The proffered evidence did not meet the standard of *Hall* and would be precluded.

On appeal, defendant does not challenge the trial court's ruling precluding a third party culpability defense. He simply argues he was denied an opportunity to raise a meaningful defense. We disagree. The trial court accorded defendant a full and fair opportunity to challenge the only evidence presented against him, to wit, the eyewitness identifications by the robbery victims. In addition, the trial court precluded the People from

arguing similar modus operandi. That defendant was not permitted to admit evidence of a post-arrest robbery where the subpoenaed victim presumably would not have identified him did not leave him without *any* means to support his defense theory. (See *Olden v. Kentucky* (1988) 488 U.S. 227, 232 [error to exclude testimony given its centrality in undermining a lead witness's testimony].) This was an evidentiary decision committed to the sound discretion of the trial court. We find no abuse of discretion.

b. Expert testimony

Defendant also contends the court wrongly excluded testimony from his expert, Dr. Gitlin. “The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion.” (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) We find no such abuse.

Defendant finds fault with the court's ruling precluding Dr. Gitlin's opinions as to whether the six-pack procedures used by Officer Reza and the other officers were fair and unbiased, or as defendant puts it, whether they were “fair memory tests.” Defendant contends the professor's opinions on this point would have been useful to the jury in helping it determine whether suggestive or biased procedures contributed to the victims' identifications of him as the perpetrator.

Specifically, defendant showed the six-pack identified as People's exhibit 10 to Dr. Gitlin at which point the prosecutor objected on the grounds of improper opinion. In a sidebar conference, the following colloquy occurred.

“[DEFENSE COUNSEL]: I just wanted to show her what’s been marked as People’s 10³ and ask her if this is an illustrative example of what she’s talking about as far as a fair test of memory and having all the suspects similarly dressed.

“THE COURT: Based on her background, training and experience?

“[DEFENSE COUNSEL]: Correct.

“THE COURT: [Counsel]?

“[THE PROSECUTOR]: Yes, Your Honor. That’s going to be an improper opinion. Whatever is a fair lineup or an unfair photographic lineup, that’s a question for the jury to decide. . . . That’s an improper opinion that takes that out of the hands of the jury.

“THE COURT: Isn’t this within the purview of the jury, [counsel]? You can ask hypotheticals, but you can’t say --

“[DEFENSE COUNSEL]: Okay.

“THE COURT: For the record, this is People’s 10, this is actual evidence, right? So I think you’ve got to stick with hypotheticals.

“[DEFENSE COUNSEL]: Okay. And I think I’ve already asked a hypothetical, so I’ll just move on.”

Defendant was allowed to present extensive testimony from Dr. Gitlin about the factors that affect the fairness of a photographic or field lineup procedure. She addressed various factors generally related to the victims’ original observations such

³ People’s exhibit 10 was one of the six-packs that did *not* contain a photograph of defendant. Defendant did not seek to elicit any similar opinions from Dr. Gitlin with respect to any of the other six-packs shown to the victims, including the six-packs that did include a photograph of defendant.

as the stress of being victimized with a gun, poor lighting and similar environmental factors, and differences in race between the victim and the suspect. Dr. Gitlin also testified about how identification procedures should be performed, including the importance of using a current, representative photograph of the suspect, and that the “filler” photographs should be of individuals similar in appearance and dress and taken in a similar setting. Dr. Gitlin also opined that a double-blind procedure is best to avoid unintentional nonverbal cues by the person administering the procedure.

Defendant’s expert was only precluded from offering an opinion whether a specific photographic array was biased. “The similarity in appearance of members of a photographic lineup, and the weight to be accorded such, are matters completely within the province of the trier of fact to resolve.” (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1053 [affirming trial court’s exclusion of expert opinion about mock lineup experiment and opinion about whether photographic array used by officers there was biased].)

The trial court properly limited the expert testimony to the factors that affect bias in a lineup procedure—testimony the jurors could use to make their own assessment, based on the evidence presented, of the circumstances under which the identifications were made by the victims in this case. There was no error by the trial court, let alone error of constitutional magnitude.

2. Remand for Resentencing Is Not Warranted

Defendant argues that in the event this court is inclined to affirm his conviction, he is nonetheless entitled to a remand for resentencing in light of the passage of Senate Bill No. 620 (2017–

2018 Reg. Sess.) during the pendency of this appeal. On January 1, 2018, Senate Bill No. 620 took effect, amending Penal Code section 12022.53, subdivision (h). The amendment restored discretion to trial courts to strike or dismiss an enhancement imposed under section 12022.53 in the interest of justice pursuant to section 1385. (Stats. 2017, ch. 682, § 2; see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080, fn. 7.) At the time of defendant’s sentencing, the statutory language mandated imposition of the enhancement.

The discretion to strike a firearm enhancement under Penal Code section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; see also *People v. Brown* (2012) 54 Cal.4th 314, 323.) It is undisputed defendant’s appeal was not final on January 1, 2018, and he is therefore entitled to the benefit of the amendment. (See, e.g., *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 “[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired”]; and, *People v. Vieira* (2005) 35 Cal.4th 264, 305[“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”].)

At the sentencing hearing, defendant requested the court impose middle terms on the robbery counts and stay sentences on the prison priors and firearm enhancements “in the interest of justice.” After imposing life terms on the murder count and the corresponding firearm enhancement, the court rejected defendant’s request for a more lenient sentence, imposing the upper term on count 1, and ordering the sentences on all the robbery counts to run consecutively. The court found that

aggravating factors outweighed any factors in mitigation and pointed out that defendant had a long history of criminal activity and his crimes were increasing in seriousness. The court further stated that defendant showed “a high degree of cruelty and callousness” in committing the offenses for which he was convicted, and that the attempted murder of Joseph G. was “most disturbing” because Joseph had complied with all of defendant’s demands but defendant still shot him.

In addition to imposing the maximum sentence on all the counts, the court stated it believed the law did not allow a stay of the firearm enhancements, “but I’ll state for the record, just for clarification, that even if I am permitted to stay this, I will not.”

The record is clear the trial court considered defendant’s request to stay the enhancements under the “the interest of justice” standard and engaged in a balancing test before concluding that the request should be denied. Although the statute had not yet been passed, in exercising its discretion, the court applied the standard later adopted by the statute. (*People v. Billingsley, supra*, 22 Cal.App.5th at p. 1081 [remand required where court is unaware of the scope of its discretionary powers].) No remand is required here.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.